

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-

76-745

LONG ISLAND LIGHTING COMPANY,
Petitioner

v.

THE LLOYD HARBOR STUDY GROUP, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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Long Island Lighting Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 9, 1976.

ORDER BELOW

The order of the Court of Appeals in *The Lloyd Harbor Study Group, Inc. v. Nuclear Regulatory Commission*, No. 73-2266 (D.C. Cir. Nov. 9, 1976) (per curiam) (*App.* 1-2) is not yet officially reported.

JURISDICTION

The order of the Court of Appeals was entered on November 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. On remanding a regulation for inadequate basis in the record, may a court of appeals create special procedural rights for rulemaking participants which exceed those rights given them by statute, even though these participants failed to show the agency below that special circumstances justified special procedures?

2. On remanding a regulation for inadequate basis in the record, may a court of appeals fail to identify the ills that it wishes cured?

STATUTES AND REGULATIONS INVOLVED

1. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970)
2. Atomic Energy Act of 1954 § 189, 42 U.S.C. § 2239 (1970)
3. 10 C.F.R. § 51.20(e) (1976)

The statutes and regulation cited above are set forth in the appendix to a petition for certiorari in *NRDC v. NRC*, No. 74-1586 (D.C. Cir. July 21, 1976), Supreme Court Docket No. 76-548. This petition was filed on October 19, 1976 by 15 electric utility companies, including Long Island Lighting Company. Much of the October 19, 1976 petition is incorporated by reference here.

STATEMENT OF THE CASE

This proceeding involves a construction permit issued to Long Island Lighting Company by the Atomic Energy Commission (now the Nuclear Regulatory Commission) for the Shoreham Nuclear Power Station. On April 12, 1973, after 70 days of hearings and the compilation of a record approaching 50,000 pages, an Atomic Safety and Licensing Board recommended the issuance of a construction permit for the Shoreham Station. That recommendation was upheld by the Atomic Safety and Licensing Appeal Board in a lengthy opinion dated October 26, 1973.

Thereafter, the Shoreham construction permit was challenged in the District of Columbia Court of Appeals

on two grounds: (1) that the Commission failed to give adequate consideration to the environmental impact of "Class 9" accidents, and (2) that the Commission failed to give adequate consideration to the incremental effect of the Shoreham Plant in terms of the environmental impact of the nuclear fuel cycle.

Lloyd Harbor Study Group, Inc. v. NRC, No. 73-2266 (D.C. Cir. Nov. 9, 1976) (per curiam), *App.* 2. The case was argued by counsel and submitted for decision on January 17, 1975. The court of appeals' per curiam order held that "the first of these challenges [the Class 9 accident issue] is without merit" *Id.* Petitioner does not question this aspect of the order below.

The court of appeals, however, went on to find that

the second of these challenges [that involving the nuclear fuel cycle] is meritorious, *see Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, Nos. 74-1385, 74-1586 (D.C. Cir. July 21, 1976); *Aeschliman v. United States Nuclear Regulatory Commission*, Nos. 73-1776, 73-1867 (D.C. Cir. July 21, 1976)

Id. The court then ordered the *Shoreham* case "remanded to the Commission for further consideration in light of the decisions" just cited. *Id.* Review is sought of this remand on nuclear fuel cycle grounds.

Of the *NRDC* and *Aeschliman* cases cited above, No. 74-1385 involved the validity of an operating license issued for the Vermont Yankee Nuclear Power Station. On September 21, 1976, Vermont Yankee Nuclear Power Corporation filed a petition for certiorari regarding the remand of *Vermont Yankee* on nuclear fuel cycle grounds, Supreme Court Docket No. 76-419.

Two of the other cases, Nos. 73-1776 and 73-1867, involved the construction permit issued for the Midland Plant. The owner of that station, Consumers Power Company, has filed a petition for certiorari, Supreme Court Docket No. 76-528, challenging the remand of the *Midland* proceeding on nuclear fuel cycle and other grounds.

The remaining case cited above, No. 74-1586, concerned the rule promulgated as a result of the AEC's Uranium Fuel Cycle Rulemaking. It is the July 21, 1976 decision of the court of appeals in this *Uranium Fuel Cycle Rulemaking* case which provides the common link between the *Shoreham* case, on the one hand, and the *Vermont Yankee* and *Midland* cases on the other. In No. 74-1586, the court set aside the reprocessing and waste management aspects of the Uranium Fuel Cycle Rule, and remanded it to the NRC for additional rulemaking. Because of that remand, the court of appeals on July 21, 1976, also remanded to the Commission the *Vermont Yankee* operating license and the *Midland* construction permit, to ensure that any revisions in the Uranium Fuel Cycle Rule would be taken into account in these proceedings. On November 9, 1976, the *Shoreham* construction permit was similarly remanded in the per curiam order at issue here.

As previously indicated, Long Island Lighting Company was one of 15 electric utility companies which petitioned on October 19, 1976 for certiorari in No. 74-1586, the *Uranium Fuel Cycle Rulemaking* case. In support of the present petition, Long Island Lighting Company incorporates by reference the statement of the case that appears in its October 19, 1976 petition on pages 3-9.

REASONS FOR GRANTING THE WRIT

Long Island Lighting Company incorporates by reference the arguments set out on pages 9-18 of its October 19, 1976 petition.

CONCLUSION

For the reasons incorporated by reference from the October 19, 1976 petition, the present request for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 73-2266

The Lloyd Harbor Study Group, Inc.,
Petitioner

v.

Nuclear Regulatory Commission and
United States of America,
Respondents

The Long Island Lighting Co.,
Intervenor

Before: McGowan and MacKinnon, Circuit Judges; Van
Pelt*, U.S. Senior District Judge for the District
of Nebraska.

ORDER

This cause came on to be heard on a petition for review of orders of the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board of the Atomic Energy Commission (now the Nuclear Regulatory Commission), and were argued by counsel. The orders appealed

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

from granted a construction permit for a nuclear power plant known as the "Shoreham Plant." The petition challenges the orders on two grounds: (1) that the Commission failed to give adequate consideration to the environmental impact of "Class 9" accidents, and (2) that the Commission failed to give adequate consideration to the incremental effect of the Shoreham Plant in terms of the environmental impact of the nuclear fuel cycle.

WHEREAS the first of these challenges is without merit, *see Carolina Environmental Study Group v. United States*, 510 F.2d 796, 798-800 (D.C. Cir. 1975), and

WHEREAS the second of these challenges is meritorious, *see Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, Nos. 74-1385, 74-1586 (D.C. Cir. July 21, 1976); *Aeschliman v. United States Nuclear Regulatory Commission*, Nos. 73-1776, 73-1867 (D.C. Cir. July 21, 1976), it is

ORDERED by the court that the case is remanded to the Commission for further consideration in light of the decisions in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, *supra*, and *Aeschliman v. United States Nuclear Regulatory Commission*, *supra*.

Per Curiam

Judge MacKinnon, in agreeing to the issuance of the foregoing order, expressed concurrence with the views expressed by Judge Tamm in his separate opinion in *Natural Resources Defense Council v. United States Nuclear Regulatory Commission*, U.S.App.D.C., F.2d (Nos. 74-1385 & 74-1586, July 21, 1976).

Filed: November 9, 1976

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